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No. 90-41

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1990

STATE OF WISCONSIN,

Petitioner,

v.

LIONEL D. WALKER,

Respondent.

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT**

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SUPPLEMENTAL STATEMENT OF THE CASE

As promised in the State of Wisconsin's petition for certiorari, *see* Petition at 4 n.8, and in a followup letter dated July 25, 1990, to the Clerk of Court, petitioner advises the Court that in accordance with the mandate of the Wisconsin Supreme Court, *State v. Walker*, 154 Wis. 2d 158, 187-89, 453 N.W.2d 127, 139-40 (1990), the Kenosha County Circuit Court held a hearing on whether a post-arrest lineup should have been suppressed. The Kenosha County court concluded that the lineup evidence was not a product of Walker's illegal arrest and can be used by the prosecution in Walker's retrial. This decision is reprinted in the Appendix to this Supplemental Brief.

The Kenosha County Circuit Court's decision resolves in the State's favor one of the two bases for conducting another trial in this case. Now the only reason for proceeding with a new trial for Walker is the Wisconsin Supreme Court's determination that the State violated *Batson v. Kentucky*, 476 U.S. 79 (1986), in Walker's original trial even though Walker did not make a *Batson* objection until seventeen months after trial.

The State has already petitioned this Court to review the Wisconsin Supreme Court's application of *Batson*. In light of the Kenosha County Circuit Court's decision on the suppression issue, the State again urges this Court,

for the reasons set forth in the petition for certiorari, to grant the petition.

Dated this 18th day of September, 1990.

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STATE OF WISCONSIN: KENOSHA COUNTY:
CIRCUIT COURT:BR 2

STATE OF WISCONSIN,

Plaintiff,

V.

LIONEL D. WALKER,

Defendant.

DECISION AND
ORDER

Case No. 86-
CF-387

This case is before the court on remand from the Wisconsin Supreme Court pursuant to it's [sic] reversal of defendant Walker's convictions for four counts of armed robbery. Prior to any new trial, this court must determine whether the lineup identification evidence must be suppressed as the fruit of Walker's unlawful arrest. The Wisconsin Supreme Court decided this case on April 2, 1990. *State v. Walker*, 154 Wis.2d 158, ___ N.W.2d ___ (1990).

On April 18, 1990, the United States Supreme Court decided *New York v. Harris*, 495 U.S. ___, 109 L.Ed.2d 13, 110 S.Ct. ___ (1990), which holds that where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton v. New York*, 100 S.Ct. 1371 (1980). Based upon the findings set forth below, this court concludes that under the rationale of *Harris, supra*, the lineup identification evidence was not an exploitation of Walker's

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illegal arrest, and, therefore, said lineup identification evidence will not be suppressed.

Walker was illegally arrested on September 4, 1986, in the rear yard of his residence at 6518-14th Avenue in Kenosha. The arrest occurred at approximately 8:30 p.m. and involved Detective Kopesky and Officers Salas and Dolnik of the Kenosha Police Department. Walker was arrested on three charges: operating after revocation, party to the crime of auto theft and obstructing (State's Exhibit 10). He was arrested without a warrant and absent any circumstances justifying the lack of a warrant. The facts leading to the arrest are as follows.

On September 3, 1986, shortly after 11:00 p.m., Kenosha police officers Laudonio and Lienenweber and Detective Perri investigated an apparent car theft from the parking lot of the 5th Amendment tavern. Laudonio apprehended a juvenile, D.N., driving a 1977 Ford van, the stolen vehicle. D.N. told Laudonio that Walker had hot-wired the van, and that Walker had a gun on the seat of his car. D.N. later told Leinenweber that Walker owned a Dierringer [sic]. D.N. also told Detective Zastro the same information, specifically that D.N. saw the gun on Walker's car seat on September 2, 1986 and that the gun had six bullets in it.

Laudonio and Perri both knew Walker was a suspect in several armed robberies. At the close of their shift they left the information regarding the van theft for the detectives investigating the armed robberies. In addition, Lienenweber's check on Walker yielded two commitments for failure to pay fines, an alias, and active probation and parole status.

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Before arresting Walker on September 4, 1986, Detective Kopesky contacted Dennis Flynn of probation and parole to report that Walker had two active commitments and was a suspect in an auto theft. Kopesky asked Flynn if Flynn would place a "verbal hold" on Walker if he were picked up and Flynn answered that he would. At approximately 7:45 p.m. Kopesky went to Walker's residence intending to wait for Walker to leave the residence. At some point Kopesky went to the front of the residence and looked through a window and saw Walker going out a rear door. Within moments, Salas and Dolnik arrested Walker in his back yard.

Kopesky advised Walker he was under arrest for the auto theft and the two commitments. Kopesky knew Walker from prior occasions and was aware Walker was a suspect in the armed robberies. No one told Kopesky a lineup was planned before it took place. Once back at the Public Safety Building Kopesky called Flynn to tell him Walker was in custody. The arrest report (State's Exhibit 10) indicates Flynn authorized a parole hold on Walker, although Flynn did not specifically recall that.

Lawrence Mahoney, field supervisor for the Department of Corrections, testified that verbal parole holds are done routinely to deter someone who is suspected of a violation of the terms of his parole, who is suspected of committing a crime, who has not paid a forfeiture [sic] or for other non-criminal matters. (There is no dispute that Walker was on parole at all times relevant to this case.) Mahoney signed the Order to Detain Walker on September 5, 1986, although he has only a vague memory of signing it. Harold Reich, Walker's parole agent in 1986, was not personally involved in placing the hold on

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Walker, but would have placed a hold on Walker if Reich had been advised of the suspected auto theft.

The clearest testimony regarding the parole hold came from Kathy Drissel, an employee of the Kenosha Sheriff's Department on September 4, 1986. Part of her duties included preparation of booking documents. She filled out the arrest sheet, Exhibit 10, at 10:30 p.m., and noted "verbal p o hold Flynn" in her own writing on the face of the arrest sheet. She typed Exhibit 11, the Booking Sheet, at 11:35 p.m. on September 4, 1986, and typed "verbal p o hold Flynn." She crossed off Flynn's name when the signed Order to Detain came from Mahoney on September 5, 1986. Drissel testified that although she had no specific recollection of preparing Exhibit 11, including [sic] the fact of the "verbal p o hold," she would not have initialed it if she didn't write it. Her handwritten initials appear as the last entry on Exhibit 11.

Detective Gary Sentieri testified that he arrived at work on September 5, 1986 at 7:00 a.m. Sentieri had been investigating the armed robberies and had been advised by Detective Zastrow on September 4, 1986, that D.N. had implicated Walker in the auto theft and had provided information that Walker owned a red hat and jacket, items identified in one of the armed robbery cases. Walker's description also matched the descriptions given in the armed robbery reports. At approximately 7:40 a.m., Sentieri advised Walker of his Miranda rights and attempted to interview Walker regarding circumstances surrounding the theft of the van and the armed robberies. Walker refused to speak to Sentieri, indicating he wanted to talk to an attorney. Sentieri then arranged for a lineup

and had five witnesses view six black males in the lineup between 9:50 and 10:40 a.m. on September 5, 1986.

In *New York v. Harris, supra*, the defendant was arrested in his home without a warrant. He allowed the arresting officers to enter his home. At that point the officers read Harris his Miranda rights. Harris indicated he understood those rights and admitted he had killed the victim. Harris was then arrested and taken to the station house where he again was advised of his Miranda rights and signed a written inculpatory statement. At the time of his arrest, the officers had various facts within their knowledge to give them probable cause to believe Harris had killed the victim.

In reaching the conclusion that the second statement taken from Harris at the station house was admissible as evidence, the Supreme Court noted that the rule in *Payton, supra*, was designed to protect the physical integrity of the home. It was not intended to grant criminal suspects protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime. Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given his Miranda warnings and allowed to talk. The Supreme Court distinguished *Brown v. Illinois*, 95 S.Ct. 2254 (1975), *Dunaway v. New York*, 99 S.Ct. 2248 (1979) and *Taylor v. Alabama*, 102 S.Ct. 2664 (1982). In each of those cases evidence obtained from a defendant following arrest was suppressed because the police lacked probable cause to arrest.

In this case the officers had probable cause to arrest Walker for a crime based upon the statements of D.N. In addition, the officers could take Walker into custody on the two civil commitments. While the arrest of Walker was unlawful, his custody, once he was removed from his residence and taken to the Public Safety Building, was lawful, based upon the probable cause. Although Walker did not admit the officers into his residence, as did Harris, the court does not find that fact of particular significance. Had Walker freely admitted Detective Kopesky into his home, the arrest still would have been unlawful. The distinguishing fact in both Harris and Walker is the probable cause to arrest.

The next question is whether, once Walker was in lawful custody on unrelated matters, he could be required to participate in the lineup for the armed robberies in which he was a suspect but for which there was no probable cause to hold him in custody at the time of the lineup. This issue has been addressed and thoroughly analyzed in *State v. Wilks*, 121 Wis.2d 93, 358 N.W.2d 273 (1984). *Wilks* involved a suspect who was in custody for a civil offense and then required to participate in a lineup for unrelated criminal matters. The Supreme Court opinion notes the balancing test which must be applied in determining whether to suppress lineup evidence obtained when a suspect is in custody on unrelated matters. The court will not here repeat the extensive analysis by Justice Callow in *Wilks*, *supra*. In summary, the incarcerated individual has an interest in his personal liberty and in the expectation of privacy, and the state has a valid interest in identifying perpetrators of crimes. The

court then concludes that the state's interest outweighed that of Wilks. The court noted:

... "There is no question but that if Wilks had been in custody for a criminal offense, he could have been required to stand in a lineup for another unrelated criminal charge. We see no distinction between a criminal and a civil arrest for purposes of requiring the incarcerated person to participate in a lineup. Since the person is already in custody, no additional deprivation of liberty is involved. A person who has been placed under valid detention does not have the same expectation of privacy as a person at liberty. The reasonable expectation of privacy in concealing one's physical appearance is small. Consequently, we hold that a person who is lawfully in custody for a civil offense may be required to participate in a lineup for an unrelated criminal offense." *State v. Wilks, supra*, 121 Wis.2d at p. 106.

Walker was in lawful custody. The officers had probable cause to arrest him for theft of the van. A parole hold was placed on him sometime before midnight of September 4, 1986. There were two commitments for him outstanding at the time of his arrest. Once he was in custody, Walker's expectation of privacy in concealing his physical appearance was small. This court concludes that the state's interest in identifying the perpetrator of the armed robberies outweighed Walker's expectation of privacy once he was in lawful custody. Under *Wilks, supra*, Walker was properly required to participate in the lineup for the armed robberies.

Finally, defense counsel argues that it is not for this court to resolve the issues in this case under the rule of *Harris, supra*, but that a rehearing should have been

requested before the Wisconsin Supreme Court. However, the factual record regarding Walker's arrest, the parole hold, D.N.'s statements concerning the van theft and the subsequent lineup was virtually nonexistent at the time of remand. An appellate court would have no record upon which to analyze the impact of *Harris* on this case.

Based upon the foregoing analysis the court concludes that Walker was in lawful custody at the time he participated in the lineup, and that therefore the lineup evidence is admissible at the time of trial. In light of this conclusion this court need not address whether the in-court identification by any witness who viewed Walker in the lineup must be suppressed.

THEREFORE, IT IS HEREBY ORDERED that the motion to suppress the lineup identification evidence is denied.

Dated this 7th day of September, 1990.

BY THE COURT:

/s/ Barbara A. Kluka

BARBARA A. KLUKA
CIRCUIT JUDGE

cc: Attorney Becker
Attorney Vetzner
Attorney Sumpter

